ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2009-2131
Plaintiff-Appellant,	:	
v.	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
WELTON CHAPPELL,	:	
Defendant-Appellee.	:	Court of Appeals Case No. 92455

MERIT BRIEF OF *AMICUS CURIAE*
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INTRODUCTION

Section 2923.24 of the Ohio Revised Code prohibits a person from possessing "any substance, device, instrument, or article, with purpose to use it criminally." After Defendant-Appellant Welton Chappell admitted to law enforcement that he copied and sold pirated CDs and DVDs, officers seized numerous pirated discs and a laptop computer from Chappell's car. These items are the criminal tools that Chappell was properly indicted under R.C. 2923.24 for possessing, with the intent to use them to violate federal copyright law. By holding that the State cannot prosecute individuals for violations of R.C. 2923.24 when the intended crime is not a violation of *state* law exclusively, the Eighth District Court of Appeals improperly relied on its own narrow definition of "criminally"—a definition that neither fits the statutory text nor comports with the word's plain meaning.

The Eighth District's decision affirming the dismissal of Chappell's indictment was wrong for two reasons. First, the Eighth District ignored the plain language of the statute. R.C. 2923.24(A) prohibits a person from possessing tools "with purpose to use [them] criminally," and the nature of the underlying "criminal use" defines whether the offense is a misdemeanor or a felony, R.C. 2923.24(B). But nothing in the law's text (or in this Court's precedent interpreting it) suggests that "criminally" is confined to violations of *state* law only.

Second, the Eighth District's decision will hamper public safety efforts by discouraging collaboration between state, federal, and local authorities investigating and prosecuting crime. Because state, federal, and local laws do not exist in separate spheres, cooperation between the various levels of law enforcement better protects the public. For instance, state and local authorities regularly assist in enforcing certain federal criminal laws. And reciprocally, certain federal statutes are expressly tied to state-law violations. Thus, the Eighth District's narrow

construction of a law that, by all indications, should be read broadly, hamstrings the efficient teamwork that best serves public safety.

For these reasons and the reasons below, the Eighth District erred, and this Court should reverse.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, R.C. 109.02, Ohio Attorney General Richard Cordray has a strong interest in the correct interpretation of Ohio's criminal laws and procedure and in defending the legislative actions of the General Assembly from constitutional attack. The Attorney General supports the State's position that the intent to use an item criminally under R.C. 2923.24 can arise from an intended violation of federal or municipal criminal law, in addition to an intended violation of Ohio law.

STATEMENT OF THE CASE AND FACTS

A. Welton Chappell was charged in connection with making unauthorized copies of DVDs and CDs found in his car.

Defendant-Appellant Welton Chappell was arrested after officers with a warrant to search the home and surrounding premises of Christopher Steward, a suspected drug dealer, discovered numerous pirated CDs and DVDs, miscellaneous packing materials, and a laptop computer in Chappell's car, as well as $6,793 in cash on his person. Chappell was visiting Steward when the officers arrived to execute the warrant, and his car was subject to search because it was parked on Steward's property. Chappell admitted to the officers that he dubs tapes and sells them for clients, and that he had illegal pirated software on his laptop. Tr. of Suppression Hrg. (Mar. 28, 2008), *State v. Chappell*, No. CR 495988 Cuyahoga County Court of Common Pleas, at 74:11-18.

Chappell was subsequently charged with two counts of criminal simulation under R.C. 2913.32, one count of receiving stolen property under R.C. 2913.51, and one count of possessing criminal tools under R.C. 2923.24. *State v. Chappell* (8th Dist.) ("App. Op."), 2009-Ohio-5371, ¶ 2. Forfeiture specifications attached to each count relating to the seized property, and Chappell forfeited his vehicle and the items inside it, as well as the $6,793 the officers found on him. Petition for Forfeiture of Seized Contraband (May 16, 2007), *State v. Chappell*, No. CR 495988 Cuyahoga County Court of Common Pleas, at 1-2. The trial court denied Chappell's motion to suppress the evidence, and Chappell proceeded to trial.

B. The trial court dismissed the criminal simulation counts, leaving the criminal tools count for trial.

At trial, the court dismissed the receiving stolen property count and declared a mistrial after the jury could not reach a unanimous verdict on the three remaining charges. The court then granted Chappell's motion to dismiss the criminal simulation counts for failure to allege a fraud on the consumer, leaving only the criminal tools charge for retrial. Journal Entry (June 5, 2008), *State v. Chappell*, No. CR 495988 Cuyahoga County Court of Common Pleas.

C. The trial court later dismissed the felony possession of criminal tools charge, and the Eighth District affirmed.

Before trial on the criminal tools count, the court ordered the State to provide Chappell with a bill of particulars outlining the charge that it sought to use as the underlying offense for the possessing criminal tools charge. The bill of particulars indicated that the State would offer evidence at trial to demonstrate that Chappell had intended to use the seized items to violate federal copyright law, 17 U.S.C. § 506. State's Supplemental Bill of Particulars (Oct. 20, 2008), *State v. Chappell*, No. CR 495988 Cuyahoga County Court of Common Pleas.

Following a hearing, the trial court dismissed the criminal tools count. Def.'s Tr. of Proceedings (Dec. 31, 2008), *State v. Chappell*, No. CR 495988 Cuyahoga Court of Common

Pleas, at 15. The court explained that the State could not base a violation of R.C. 2923.24 on a person's intent to use items to violate a federal law, rather than an Ohio law. *Id.* The court stated that federal copyright infringement "is not a crime that is defined . . . under State law," and "the intent to use an item criminally must come from a violation of—or an intended violation of—*State* law." *Id.* at 14 (emphasis added). The trial court further noted that "the State is not free to use the law of any jurisdiction or federal law in order to support its claim." *Id.* Accordingly, the court dismissed the case without prejudice. *Id.* at 15.

The State appealed, and the Eighth District affirmed.[1] App. Op. at ¶ 14. Citing R.C. 2901.03(A), which states that "[n]o conduct constitutes a criminal offense against the state unless it is defined as an offense in the revised code," the Eighth District adopted the lower court's position, explaining that the allegations in the indictment did not make out an offense under Ohio law, because "[v]iolating federal copyright law is not defined as an offense in the Revised Code nor does the Code provide any penalty for it." *Id.* at ¶ 9.

This Court granted jurisdiction to consider whether the State may charge a defendant with a violation of R.C. 2923.24, "Possessing Criminal Tools," where the defendant intended to use the items in question to violate federal or municipal criminal law, rather than Ohio law. *State v. Chappell*, 124 Ohio St. 3d 1473, 2010-Ohio-354.

[1] Chappell cross-appealed the trial court's denial of his motion to suppress, but the Eighth District dismissed the appeal as untimely. App. Op. at ¶ 17.

ARGUMENT

***Amicus Curiae* Attorney General's Proposition of Law:**

The intent to use an item criminally under R.C. 2923.24 can arise from an intended violation of federal or municipal criminal law, as well as from a violation of Ohio law.

The Eighth District erred in holding that a charge under R.C. 2923.24 can only be based on the intent to use items to violate state law. First, the Eighth District ignored the plain language of R.C. 2923.24, which does not limit the prohibited conduct to the intended use of tools to violate state law. Second, public policy supports the State's position. State and local authorities are entitled to arrest people for violating federal law in other contexts, and, given the State's undeniable interest in protecting its citizens from crime—be it grounded in state, federal, or municipal law violations—there is no reason that R.C. 2923.24 should be an exception to that rule.

A. The plain language of R.C. 2923.24 is not limited to using tools in connection with a violation of state law.

This case begins and ends with the statute, and this Court need only "apply the law as written" to determine that the Eighth District's decision was wrong. See *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101, 105-06. The statute states in relevant part, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, *with purpose to use it criminally*." R.C. 2923.24 (emphasis added).

R.C. 2923.24 is straightforward and conveys a clear and definite meaning. See *State v. Elam*, 68 Ohio St. 3d 585, 587, 1994-Ohio-317. The statute provides that no one can possess an item "with purpose to use it *criminally*," regardless of whether it is designed for or typically used for crime. R.C. 2923.24 (emphasis added). Thus, the question becomes how to define "criminally."

"Undefined words used in a statute must be accorded their usual, normal, or customary meaning." *Bowman v. Columbiana County Bd. of Comm'rs* (1997), 77 Ohio St. 3d 398, 400; accord *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, ¶ 12 (citations omitted); R.C. 1.42. In common usage, "criminally," means "relating to, involving, or being a crime," "relating to crime or to the prosecution of suspects in a crime," and "guilty of a crime" or "befitting a criminal." *Merriam-Webster's Online Dictionary*, available at http://www.merriam-webster.com/dictionary/criminal (last visited Mar. 23, 2010). Therefore, where a defendant possesses an item with purpose to use it "relating to" or "involving" crime, his conduct falls under the statute. Thus, given its plain meaning, there is no basis for limiting "criminally" to violations of *state* law.

Moreover, there is no indication from the General Assembly that it intended to create such a limitation. Had the General Assembly intended to limit R.C. 2923.24 to possession of tools with the intent to use them to violate only the laws of Ohio it could have (and would have) done so here, as it has in other contexts. For instance, the director of agriculture may refuse to grant or suspend a small livestock dealer's license without a hearing if there is a reasonable cause to believe that he "violated the *laws of the state* or official regulations." R.C. 943.05.

Finally, the Eighth District's decision limits R.C. 2923.24 to violations of state law conflicts with this Court's decision to label R.C. 2923.24 a "general statute." See, e.g., *State v. Volpe* (1988), 38 Ohio St. 3d 191, 193-94. In *Volpe*, this Court held that a defendant convicted of gambling and operating a gambling house under R.C. 2915.02 and R.C. 2915.03 could *not* be convicted of possessing criminal tools in violation of R.C. 2923.24, because the General Assembly already specifically provided that possessing a gambling device was a misdemeanor

under R.C. 2915.02. *Id.* at 194 (noting that specific statutory provisions prevail over general statutory provisions).

This Court held that "R.C. 2923.24, a *general* statute prohibiting possession and control of criminal tools and classifying such conduct as a fourth degree felony, cannot be used to charge and convict a person of possessing and controlling a gambling device." *Id.* (emphasis added).[2] The general nature of the statute is based in part on the fact that "[t]he conduct sought to be prohibited by [R.C. 2923.24] does not lend itself to concise, specific wording. The General Assembly cannot reasonably be required or expected to list every article or device and how it could be used in a criminal manner." *State v. McDonald* (1987), 31 Ohio St. 3d 47, 49 (holding that R.C. 2923.24 is constitutional on its face). In short, as this Court has recognized, R.C. 2923.24 is "broad" for a reason, and the Eighth District's decision to narrow the statute contravenes the Assembly's intent in drafting it.

Finally, it is well established that the General Assembly has the sole legislative power in Ohio, and that it may pass any law that is not prohibited by the state or federal constitutions. Ohio Const. Art. II, § 1. *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County* (1967), 9 Ohio St. 2d 159, 162. But Chappell has not raised a constitutional argument, and notably, nothing in either the state or federal constitution prohibits a State from enforcing a federal or municipal law, or visa versa.

As shown above, the meaning of R.C. 2923.24 is clear on its face. But even if this Court considered the legislative intent to determine the meaning of "criminally," the Eighth District's interpretation would still be wrong.

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[2] At the time of this Court's decision in *Volpe*, any violation of R.C. 2923.24 was a felony, but the General Assembly amended the statute in 1995, and violations of the statute can now be a felony or a misdemeanor. R.C. 2923.24(B); see S.B. 2.

"If the meaning of a provision cannot be ascertained by its plain language, a court may look to the purpose of the provision to determine its meaning." *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, ¶ 14 (citing *Castleberry v. Evatt* (1946), 147 Ohio St. 30, 33, syl. ¶ 1). R.C. 2923.24 is "an expansion of the former statute prohibiting the possession of burglar's tools," and it lists situations "establishing prima facie violations involving items having a high liability for criminal use." *McDonald*, 31 Ohio St. 3d at 50. The Legislative Service Commission stated that in addition to prohibiting items designed specifically for criminal use, the statute was intended to target "[i]tems which are commonly used for criminal purposes but which also have legitimate purposes . . . [when] possessed under circumstances indicating a criminal purpose." 1974 Committee Cmt. to H 511.

Under the terms of the indictment, Chappell's car, CDs, DVDs, and laptop perfectly fit the type of items targeted by the General Assembly. Although all of the objects Chappell forfeited have legitimate purposes, the State specifically alleged that Chappell had intended to use them to make unauthorized recordings of copyrighted CDs and DVDs. Under federal copyright law, "[a]ny person who willfully infringes a copyright . . . for purposes of commercial advantage or private financial gain," 17 U.S.C. § 506(a)(1)(A), commits criminal copyright infringement. Thus, in admitting that he intended to use the materials in his car to create unauthorized recordings of CDs and DVDs that he would then sell, Chappell was intending to commit a crime, thereby triggering R.C. 2923.24.[3]

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[3] The preemption provisions of the Copyright Act, 17 U.S.C. § 301, do not prohibit the State from charging Chappell with possessing criminal tools with the purpose and intent to violate federal copyright law. Under 17 U.S.C. § 301, a state common law or statutory claim is preempted if: (1) the work is within the scope of the subject matter of copyright, as specified in 17 U.S.C. §§ 102, 103; and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as forth in 17 U.S.C. § 106—reproduction, preparation of derivatives, performance, distribution, and display. See *Harper & Row*

B. State, federal, and local authorities act to enforce each other's laws in other contexts, and R.C. 2923.24 operates similarly.

This Court can and should reverse the Eighth District based solely on the statutory text. But public policy further supports interpreting R.C. 2923.24 to include items intended for use in violating federal law. Both federal and state statutes allow the cooperation and collaboration of federal and state authorities to prevent criminal activity, regardless of whether that activity violates federal or state law, confirming that a crime is a crime, no matter what the jurisdiction.

States are sovereign governments with broad "police powers," where "police powers" are "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people." *Manigault v. Springs* (1905), 199 U.S. 473, 480. It has long been the rule that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States v. Lanza* (1922), 260 U.S. 377, 382. In this way, state "police power . . . encompasses the authority to cope with prevailing conditions for the purpose of serving the public welfare. . . . 'If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?'" *State ex rel. Eaton v. Price* (1958), 168 Ohio St. 123, 135 (internal citations omitted). Accordingly, it is well established that "the authority of state police to make arrests for violations of federal law is not limited to situations in which state officers are exercising power delegated by the federal government to the states." Kris Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration*

Publishers, Inc. v. Nation Enters. (2d Cir. 1983), 723 F.2d 195, 199-200, rev'd on other grounds (1985), 471 U.S. 539; accord *State v. Perry*, 83 Ohio St. 3d 41, 42, 1998-Ohio-422. R.C. 2923.24 is not preempted because a violation of the statute is predicated upon the possession or control of a device with the intent to use it criminally, incorporating elements beyond those listed in 17 U.S.C. § 106. *Harper*, 723 F.3d at 200. Even if this Court were to adopt Chappell's position on preemption (and it should not), the Court should clarify that a violation of R.C. 2923.24 can arise from an intended violation of federal or municipal criminal law in a case where preemption is *not* at issue.

Arrests, 69 Alb. L. Rev. 179, 199-200 (2005). In fact, "it is a general and inherent authority based on the fact that the states retain their sovereignty in the U.S. constitutional framework. The states' arrest authority is derived from the basic power of one sovereign to assist another sovereign." *Id.*

And in fact, state and federal authorities regularly assist each other in snuffing out criminal activity. See, e.g., *Bartkus v. Illinois* (1959), 359 U.S. 121, 123 (recognizing that state and federal authorities often assist each other in investigations and holding that such cooperation does not run afoul of the Double Jeopardy Clause); *United States v. Mejias* (2d Cir. 1977), 552 F.2d 435, 437 (noting that federal and state authorities participated in an intensive cooperative investigation before arresting defendants, members of a comprehensive international drug ring).

This state assistance of the federal government is exemplified by federal immigration law. The Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101, serves as the "federal statutory scheme for regulation of immigration and naturalization." *DeCanas v. Bica* (1976), 424 U.S. 351, 354. But various federal statutes evince "a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration law." *United States v. Vasquez-Alvarez* (10th Cir. 1999), 176 F.3d 1294, 1300. For instance, 8 U.S.C. § 1357(g) authorizes the United States Attorney General to enter into an agreement with a political subdivision of a state to permit local officials to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens. And 8 U.S.C. § 1252c(a) provides that under certain circumstances, "[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left

the United States after such conviction." Thus, although "the authority to control immigration is . . . vested solely in the Federal Government, rather than the States," *Hampton v. Mow Sun Wong* (1976), 426 U.S. 88, 101 n.21, the INA "leaves open the possibility of local and state assistance in the enforcement of federal immigration laws," *Farm Labor Org. Comm. v. Ohio State Hwy. Patrol* (N.D. Ohio 1997), 991 F. Supp. 895, 903; accord *Gonzales v. City of Peoria* (9th Cir. 1983), 722 F.2d 468, 475 (federal law does not preclude local enforcement of the criminal provisions of federal immigration law).

In fact, in 2007, the Ohio Attorney General issued two opinions that allow a county sheriff to arrest and detain an alien without a warrant where there is probable cause that the alien violated a criminal or federal immigration law.[4] Ohio Attorney General Opinion No. 2007-018 (June 28, 2007)[5]; Ohio Attorney General Opinion No. 2007-029 (Sept. 6, 2007).[6] Both opinions explain that Ohio sheriffs, who are local law enforcement officers, are entitled to arrest individuals who violate federal criminal immigration law in conjunction with their statutory power and duty to preserve the "public peace" under R.C. 311.07 and R.C. 311.08.

Ohio state authorities can also "render assistance to any federal law enforcement officer" with arrest authority under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001, Pub. L. No. 107-056, 115 Stat. 272, as amended. R.C. 2935.033. The statute was drafted "to establish requirements for state and local compliance with federal homeland security authorities and laws

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[4] Congress set forth different procedures for the enforcement of federal criminal immigration law and federal civil immigration law. The former are prosecuted in federal courts, see, e.g. 8 U.S.C. § 1253(a), and the latter are dealt with administratively, *id.* at § 1227.

[5] Available at http://www.ohioattorneygeneral.gov/getattachment/7cb42e9d-6c42-429c-b022-f9004b196320/2007-018.aspx (last visited Mar. 23, 2010).

[6] Available at http://www.ohioattorneygeneral.gov/getattachment/3235a11f-f77d-4158-8b99-c7a8da6662e0/2007-029.aspx (last visited Mar. 23, 2010).

pertaining to terrorism and homeland security." S.B. 9, Synopsis (eff. Jan. 11, 2006). R.C. 2935.033 expressly limits state authorities' power to situations where: (1) there is a threat of imminent physical harm to the officer or another person, or any other serious emergency situation; and (2) either the officer requests assistance or it appears that he cannot do so, or the circumstances reasonably indicate that assistance is appropriate. Thus, the statute showcases the high value that Ohio places on protecting the public, even where defendants appear to be violating only federal law.

Reciprocally, certain federal law violations are grounded in violations of state law. For instance, the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), imposes a special mandatory fifteen-year prison term on a felon who unlawfully possesses a firearm under 18 U.S.C. § 922(g), and who has three or more prior convictions for committing certain drug crimes or a "violent felony." The ACCA defines "violent felony" as a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Generally, whether a defendant has committed a "violent felony" that triggers the ACCA depends entirely on state law, because most courts use a categorical approach to determine what constitutes a "violent felony," looking at the statutory definitions of a defendant's prior offenses. See, e.g., *Taylor v. United States*, 495 U.S. 575, 602 (1990) (noting that the ACCA "generally requires that trial court to look only to the fact of the conviction and the statutory definition of the prior offense"); see also Jondavid S. Delong, *What constitutes "violent felony" for purpose of sentence enhancement under Armed Career Criminal Act (18 U.S.C.A. § 924(e)(1))*, 119 A.L.R. Fed. 319 (2010), at *2(a). Just as the federal government, under the ACCA, relies on a state's definition of what constitutes a "violent felony" in deriving

its own jurisdiction to levy a sentencing enhancement, the State may use the federal government's definitions of "criminal" conduct to prosecute a defendant for violating R.C. 2923.24.

The Eighth District's decision ignored the State's clear preference for state, federal, and local collaboration in targeting crime. The fact that state and local authorities regularly collaborate with the federal government to enforce federal laws is evidence of the preference for state and federal collaboration in targeting crime. Moreover, given that a federal statute, like the ACCA, is expressly rooted in States' definitions of criminal violations, the federal government sometimes defers to state law in enforcing its own provisions. The efforts by law enforcement at all levels to work together to eradicate criminal activity—no matter where it arises—will surely be thwarted should the State be unable to prosecute violations of its own criminal code that are connected to a defendant's efforts to violate federal law.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully asks this Court to reverse the Eighth District's decision and hold that the State may charge a defendant with a violation of R.C. 2923.24 where he intended to use items criminally in violation of a federal or municipal criminal law.

Respectfully submitted,

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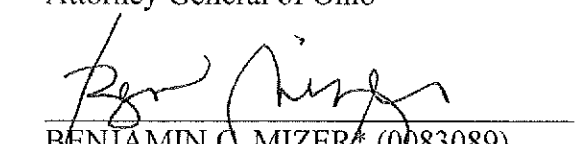

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 2nd day of April, 2010, upon the following counsel:

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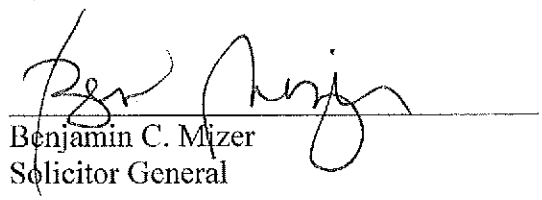

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